IN THE SUPREME COURT OF FLORIDA

Case No. SC01-2205

On Appeal from a Final Order of
The Florida Public Service Commission

BELLSOUTH TELECOMMUNICATIONS, INC.,

Appellant,

v.

E. LEON JACOBS, JR., et al.,

Appellees.

INITIAL BRIEF OF BELLSOUTH TELECOMMUNICATIONS, INC.

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INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth") appeals a decision of the Florida Public Service Commission ("Commission") (1) requiring BellSouth to discontinue assessing its 1.5% interest carrying charge designed to recover the loss of the use of money associated with delinquent payments greater than $6.00; and (2) ordering BellSouth to make refunds to those customers that have been assessed with such charges. (R-438.)

STATEMENT OF THE CASE AND FACTS

A. The Commission's 1986 Approval of BellSouth's Charge to Recover Costs Incurred in Recouping Past-Due Balances

On February 3, 1986, Southern Bell Telephone & Telegraph Company (now BellSouth) filed a tariff seeking to institute a 1.5% late payment charge on outstanding balances that existed at the time of the next billing date. (R-221). On May 28, 1987, the Commission staff recommended approval of that charge. (R-157). The staff stated that the expenses intended to be recovered with this charge were those required to be incurred by BellSouth in treating delinquent accounts and "generated by activities such as the business office making and receiving calls to delinquent customers." (R-168). In recommending approval, the staff further pointed out that the income from the late payment charge would only partially offset the costs associated with administering the collection process. (R-173). In Order No. 17915 dated July 27,

1987, the Commission adopted its staff's recommendation and approved the late payment charge, stating that the charge would contribute to the recovery of the expenses incurred by Southern Bell "in treating customer accounts." In re: Review of Southern Bell Telephone and Telegraph Company's Late Payment Charge, 87 F.P.S.C. 7:300 (1987). (R-221). Importantly, as acknowledged in Order No. 17915, the late payment charge was not intended to allow BellSouth to recover the loss of use of money associated with delinquent payments; rather, it was solely intended to recover the expenses incurred in recouping past-due payments. (R-221).

B. The Price Regulation Statute

In 1996, the Florida Legislature enacted a statute, Section 364.051, Florida Statutes (1995), which replaced the traditional rate-of-return form of telephone regulation with what is commonly known as "price cap" regulation. As the name suggests, under price cap regulation, the Commission does not limit the rate of return that BellSouth may obtain for its service; rather, it simply "caps" the price that BellSouth can charge for certain services.

Under the price regulation statute, the Commission has the authority to regulate the price of two kinds of telephone services: (1) "basic local service" pursuant to Section 364.051(2), and (2) "nonbasic service" pursuant to Section 364.051(5)(a).[1]

[1] The Commission also has the authority to regulate the price of network access services under Section 364.163, Florida Statutes (2001), but this statute is not at issue in this appeal.

Basic local service is not at issue in this case. As defined in Section 364.42(8), Florida Statutes (1999):

> 'Nonbasic service' means any telecommunications service provided by a local exchange telecommunications company other than a basic local telecommunications service, a local interconnection arrangement described in s. 364.16, or a network access service described in s. 364.163. (emphasis added).

This definition is central to this case, because if a charge or price imposed by BellSouth is not a charge for "nonbasic service," then the Commission has no authority to regulate the charge. If, however, a service does qualify as a "nonbasic service," certain price limitations apply. In particular, Section 364.051(5)(a), Florida Statutes (2000),[2] states in pertinent part:

> (5) NONBASIC SERVICES.—Price regulation of nonbasic services shall consist of the following:
>
> (a) Each company subject to this section shall maintain tariffs with the commission containing the terms, conditions, and rates for each of its nonbasic services, and may set or change, on 15 days' notice, the rate for each of its nonbasic services, except that a price increase for any nonbasic service category shall not exceed 6 percent within a 12-month period until there is another provider providing local telecommunications service in an exchange area at which time the price for any nonbasic service category may be increased in an amount not to exceed 20 percent within a 12-month period, and the rate shall be presumptively valid.

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[2] When the tariff amendment at issue in this case was filed in 1999, this section was designated as 364.051(6)(a). The section was renumbered as Section 364.051(5)(a), but not amended, by Chapter 2000-334, Laws of Florida. Because the Commission has referred to the statute as 364.051(5)(a), it will be designated in that manner throughout this brief.

C. BellSouth's New Interest Carrying Charge

On July 7, 1999, BellSouth filed a tariff amendment to (1) restructure its late payment charge, and (2) institute a new 1.5% interest carrying charge on delinquent accounts. (R-455). The late payment charge was changed to a flat rate fee of $1.50 for residential customers and $9.00 for business customers for past due accounts greater than $6.00. (R-455). The interest carrying charge applied only to past due accounts greater than $6.00 (R-455). The new interest carrying charge was intended to recover a different set of expenses than had been recovered through the late payment charge. (R-455). Instead of seeking to recover collection-related expenses (e.g., calls and letters seeking to prompt payment), the new interest carrying charge was designed to recover the loss of use of money associated with delinquent payments, such as the cost of borrowing money to meet cash flow needs or loss of interest that would have been earned had timely payment been made. (R-455). Prior to this tariff revision, BellSouth did not impose any charges to recover the loss of use of money. The tariff became effective on August 28, 1999. (R-438).

On June 29, 2000, the Commission staff recommended that BellSouth's tariff amendment be cancelled and that BellSouth be required to provide refunds to all affected customers. (R-225). By Order No. PSC-001357-PAA-TL, issued on July 27, 2000, the Commission issued a Notice of Proposed Agency Action, tentatively finding that BellSouth's July 9, 1999, tariff filing violated Section 364.051(5)(a), the price cap

statute for nonbasic services. In re: Investigation to determine whether BellSouth Telecommunications, Inc.'s tariff filing to restructure its late payment charge is in violation of Section 364.051, F.S., 00 F.P.S.C. 7:316 (2000). (R-34). The Commission's rationale was that the restructured flat rate late payment charge and the new interest carrying charge, when considered together, were in excess of the 6% price increase for any nonbasic service category permitted by Section 364.051(5)(a). (R-34).

BellSouth filed a timely petition for a formal Commission hearing pursuant to Section 120.57(1), Florida Statutes (1999). (R-44). The Office of Public Counsel filed a Notice of Intervention. (R-60). Thereafter, the parties informed the Commission that they could enter into a joint stipulation of the facts constituting the evidentiary record and requested that the case proceed pursuant to the informal hearing process set forth in Section 120.57(2), Florida Statutes (1999). (R-62, 67). Thus, the Commission cancelled the formal hearing that had been scheduled originally and directed the parties to file briefs on the legal propriety of the tariff amendment. (R-96, 105). The parties subsequently filed a joint stipulation of the record. (R-131).

In its brief before the Commission, BellSouth argued that the 1.5% interest carrying charge was not a "nonbasic telecommunications service" as contemplated by Section 364.051(5)(a) because it was not a "service" of any kind, much less a "telecommunications service," which is required by the statute. Rather, it was simply

a charge (similar to a late charge on a credit card bill) used to recover the loss of the use of money. (R-118-124). Further, BellSouth argued that if the carrying charge is a nonbasic telecommunications service, it was a new service not subject to the 6% price increase limitation under Section 364.051(5)(a). (R-124-129).

In Final Order No. PSC-01-1769-FOF-TL, issued August 30, 2001, the Commission rejected BellSouth's position by holding that the 1.5% carrying charge is a nonbasic service subject to the price regulation statute. In re: Investigation to determine whether BellSouth Telecommunications, Inc.'s tariff filing to restructure its late payment charge is in violation of Section 364.051, F.S., 01 F.P.S.C. 8:348, 358 (2001). (R-438). In addition, the Commission held that the 1.5% carrying charge is not a new service but rather an expansion of the restructured late payment fee. Id. (R-438). Thus, because it determined that the interest carrying charge together with the late payment charge exceeded the allowable price increase for any nonbasic service category, the Commission held that the charge violated Section 364.051(5)(a) and ordered BellSouth to discontinue assessing the 1.5% interest carrying charge and make appropriate refunds of monies already collected. Id. (R-438). The Commission did, however, uphold the new late payment fee of $1.50 for residential customers and $9.00 for business customers for past due accounts, because, as restructured, it did not violate the 6% price increase cap. Id. (R-438).

BellSouth filed a timely appeal from the Final Order of the Commission. (R-

471).

SUMMARY OF THE ARGUMENT

In 1996, BellSouth became subject to price regulation. Rather than being regulated through their rates of return, local telecommunications companies such as BellSouth are permitted to determine their prices subject only to limitations on the rates for basic local services and nonbasic services. The rates for basic local services are not at issue. Section 364.051(5)(a), pertaining to nonbasic services, is the statute pertinent to this appeal. Under Section 364.051(5)(a), local telecommunications companies are prohibited from increasing the price for any nonbasic service category in a 12-month period beyond certain percentages. However, Section 364.051(5)(a) places no limitations on the price for new nonbasic services.

In 1986, prior to price regulation, BellSouth imposed a late payment charge. As the Commission acknowledged, the late payment charge only partially covered the costs of collecting delinquent accounts and was not intended to reimburse BellSouth for any loss of use of the money incurred by reason of late paying customers.

In 1999, BellSouth filed a tariff amendment to restructure its existing late payment charge. It also instituted a new 1.5% interest carrying charge intended to recover the loss of use of money associated with delinquent payments.

In deciding this case, it is important to remember what is not in dispute. The original 1.5% late payment charge, which has been restructured to a flat rate fee of

$1.50 for residential customers and $9.00 for business customers for past due accounts greater than $6.00, was approved by the Commission and is not contested by the Office of Public Counsel. The only charge at issue is the new 1.5% interest carrying charge for loss of use of the money imposed on past due accounts greater than $6.00. The sole issue in this case is whether the imposition of this charge violates Section 364.051(5)(a).

Section 364.051(5)(a) only regulates price increases for nonbasic services. Section 368.02(8) defines nonbasic service as "any telecommunications service provided by a local exchange telecommunications company . . . ." Therefore, the price regulation statute cannot apply to the 1.5% carrying charge unless this charge is a "telecommunications service." The 1.5% carrying charge for the loss of use of money is neither a service nor a telecommunications service. Although the statute does not define "telecommunications service," the phrase is uniformly accepted in the law, in dictionaries, and in common usage as meaning the transmission of signals or information. Therefore, it cannot be a nonbasic service, and the Commission exceeded its authority in ordering a refund for monies collected by virtue of this charge.

In any event, even if the 1.5% interest carrying charge could be considered a telecommunications service, the Commission is still without authority to regulate it. The Commission has acknowledged that Section 364.051(5)(a) is not applicable to new nonbasic service charges. The 1986 late payment charge covers only the costs

associated with collecting late payments. Therefore, because the 1.5% interest carrying charge is directed only to covering the loss of the use of the money occasioned by delinquent accounts, it is necessarily a new nonbasic service, which is not subject to regulation under the statute.

Furthermore, by holding that the late payment charge and the 1.5% carrying charge are one and the same, the Commission has discriminated against BellSouth contrary to Section 364.051(5)(b), Florida Statutes (1999), because other telecommunications companies, which have not previously imposed such charges, can now institute them at a higher rate than BellSouth will be permitted to do.

STANDARD OF REVIEW

This case was decided on a joint stipulation of facts in an informal administrative proceeding pursuant to Section 120.57(2), Florida Statutes (1999). The standard of review applicable to a final order issued in a section 120.57(2) informal administrative proceeding is set forth in Section 120.68, Florida Statutes (1999). Cohen v. Department of Bus. Reg., Div. of Pari-Mutuel Wagering, 584 So. 2d 1083, 1085 (Fla. 1st DCA 1991). Section 120.68(7) prescribes application of different standards of review depending on the nature of the agency's decision. § 120.68(7), Fla. Stat. (2001); Parlato v. Secret Oaks Owners Ass'n, 793 So. 2d 1158, 1162 (Fla. 1st DCA 2001); Southwest Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc., 773 So. 2d 594, 597 (Fla. 1st DCA 2000). Here, the Commission's Final Order adjudicates an

issue of law concerning the applicability of Section 364.051(5)(a) to BellSouth's 1.5% interest carrying charge. The applicable standard of review for issues of law is provided in Section 120.68(7)(d), which states in material part that "[t]he court shall . . . set aside agency action . . . when it finds that . . .[t]he agency has erroneously interpreted a provision of law. . . ." Thus, the standard of review is de novo. Southwest Fla. Water Mgmt. Dist., 773 So. 2d at 597.

ARGUMENT

I. THE 1.5% INTEREST CARRYING CHARGE FOR LOSS OF USE OF MONEY IS NOT A NONBASIC SERVICE.

The threshold issue before this Court is simple: did the Commission exceed its statutory authority by expanding the scope of Section 364.051(5)(a), the price regulation statute for "nonbasic services"? Under the plain text of the definition of "nonbasic services," only "telecommunications services" may be "nonbasic services." § 364.02(8), Fla. Stat. (1999). If the Commission's finding that BellSouth's 1.5% interest carrying charge is a "nonbasic service" is incorrect as a matter of law, then the Commission's conclusion that the 1.5% interest carrying charge is prohibited by the price regulation statute and must be reversed.

Generally, orders of the Commission come before this Court "clothed with the statutory presumption that they have been made within the Commission's jurisdiction and powers, and that they are reasonable and just and such as ought to have been

made." General Tel. Co. v. Carter, 115 So. 2d 554, 556 (Fla. 1995). Such deference, however, is inapplicable when, as here, the Commission exceeded its authority. United Tel. Co. v. Public Serv. Comm'n, 496 So. 2d 116, 118 (Fla. 1986).

It is well settled that the Commission is a creature of statute. City of Cape Coral v. GAC Utilities, Inc., 281 So. 2d 493 (Fla. 1973). "As such, the Commission's powers, duties and authority are those and only those that are conferred expressly or impliedly by statute of the State. . . . Any reasonable doubt as to the lawful existence of a particular power that is being exercised by the Commission must be resolved against the exercise thereof. . . ." Id. at 496 (citations omitted).

As will be established below, the Commission exceeded its statutory authority by finding that the 1.5% carrying charge constituted a nonbasic service subject to the price-regulation statute, because in doing so, the Commission impermissibly expanded the scope of the price regulation statute.

A. Statutory Background of the Price Regulation Statute

This case turns first and foremost on the limitations that the Legislature placed on the Commission's authority in Section 364.051, the price regulation statute. The Legislature's implementation of price regulation, as contrasted to the former regulation through rate of return, reflects a philosophy of less governmental control and the promotion of market competition for telecommunication services. Fla. H.R. Comm.

On Util. & Telecom, CS for SB 1554 (1995) Staff Analysis 1 (final May 18, 1995) (finding that the price regulation scheme "permits the prices and rates for services to be regulated by market forces rather than the PSC."); see also, GTC, Inc. v. Garcia, 791 So. 2d 452, 457-58 (Fla. 2000).

As a consequence, local telecommunications companies may now determine their own prices, subject only to the limitations on the rates of basic local service, Section 364.051(2) and nonbasic services, Section 364.051(5)(a). The marketplace dictates the amount of all other prices. Indeed, the Commission acknowledged this point when it explained that if BellSouth's interest carrying charge was a new service, it was not subject to monitoring by the Commission. (R-449).

Therefore, if a charge or price imposed by a telecommunications company is not a charge for telecommunications service, whether it be basic or nonbasic service, the Commission has no authority to regulate that price or charge. There is no dispute here that the interest carrying charge is not a "basic local telecommunications service" as that term is defined in Chapter 364. The only question here is whether that charge is a "nonbasic service." As noted above, "nonbasic service" is defined as "any **telecommunications service** provided by a local exchange telecommunications company other than a basic local telecommunications service, a local interconnection arrangement described in s. 364.16, or a network access service described in s. 364.163." § 364.02(8), Fla. Stat. (1999) (emphasis added). If the 1.5% interest

carrying charge is not a "nonbasic service," it is undisputed that the Commission lacks authority to regulate it.

B. The Commission Erred and Exceeded the Scope of Its Authority by Finding that the Interest Carrying Charge Was Subject to the Price Regulation Statute.

The Commission found that the 1.5% interest carrying charge was a nonbasic service subject to the price regulation statute.[3] (R-438). The Commission based its decision on the premise that, pursuant to Section 364.02(11), "service should be construed in the 'broadest' sense of the word" and that the interest charge is a "service" BellSouth offers to delinquent customers for carrying their unpaid balances. (R-446). In order to make this finding, the Commission determined that the 1.5% carrying charge constituted a "telecommunications

[3] There is nothing in the price regulation statutes which gives the Commission authority to regulate interest rates. Of course, like other businesses which impose similar charges, BellSouth's carrying charge is subject to the usury laws.

service." For the reasons discussed below, the Commission exceeded its authority because, by finding that the 1.5% carrying charge was a "telecommunications service" and thus a "nonbasic service," the Commission expanded the scope of the price regulation statute and, in turn, the breadth of its own authority.

1. The Commission's Order Violates Basic Statutory Interpretation Principles.

The Commission erred and exceeded its statutory authority by finding that the interest carrying charge was subject to the price regulation statute, because in doing so, the Commission failed to consider and/or properly apply basic statutory interpretation rules. These rules establish, without question, that Section 364.051(5)(a) is inapplicable to the interest carrying charge because a charge to recoup the loss of use of money occasioned by late payment cannot be considered a "telecommunications service," which is essential to a finding that the interest carrying charge is a nonbasic service.

A fundamental principle of statutory construction is that undefined words in a statute should be given their plain and ordinary dictionary meaning. As explained by this Court in Rollins v. Pizzarelli, 761 So. 2d 294 (Fla. 2000):

> When a term is undefined by statute, '[o]ne of the most fundamental tenets of statutory construction' requires that we give a statutory term 'its plain and ordinary meaning.' When necessary, the plain and ordinary meaning 'can be ascertained by reference to a dictionary.'

761 So. 2d at 298. Under this principle, there can be no question that the 1.5% interest

carrying charge is not a “telecommunications service.”

a. The 1.5% Carrying Charge Does not Constitute a “Service.”

There are many definitions of "service" in Webster's New International Dictionary, Second Edition. The most relevant definition reads: "Performance of labor for the benefit of another, or at another's command." Obviously, when the Legislature sought to cap the prices that local exchange companies could charge for telecommunications services, the Legislature contemplated services being provided by the local exchange company to the customer—not business expenses and losses generated by customers' unilateral refusal or failure to pay their bills. A requirement that a delinquent customer pay an interest charge to make up for what the company could have earned on the money cannot fairly be characterized as a service by the company.

BellSouth acknowledges that Section 364.02(11), Florida Statutes (1999), provides that service "is to be construed in its broadest and most inclusive sense," but the word "service" can only be stretched so far. It is well settled that, in interpreting statutes, the courts are constrained to avoid absurd or unreasonable results. See City of St. Petersburg v. Siebold, 48 So. 2d 291 (Fla. 1950).

The Commission's conclusion that the interest carrying charge is a service that BellSouth renders to its customers in return for not terminating delinquent accounts is

a leap in logic that cannot withstand reasoned analysis. The 1.5% carrying charge is not associated with a particular BellSouth product or service and is triggered only by the fact that a customer has failed to timely pay a bill. Indeed, the 1.5% carrying charge is not even limited to services rendered by BellSouth, because charges imposed by long distance companies for toll calls, and state and federal taxes and fees, are also subject to this charge. Simply put, the carrying charge is a penalty—not a "service"—imposed on customers who fail to pay their bills on time. It is no different than any penalty or fee imposed by any other company for failing to timely pay a bill.

Under the Commission's analysis, any penalty imposed by a company for delinquent payment, be it by American Express, Ford Motor Credit Company, or BellSouth, could be construed as a service to the customer. Such a result is not supported by common business practices. Further, it strains common sense to find that a customer, who is charged a fee for failing to timely pay a bill, would consider that fee to be a charge for a service received rather than a penalty for failing to pay a bill on time.

The inherent flaw in the Commission's analysis is that it assumes that the customer pays the 1.5% carrying charge in return for not having his or her account terminated. The paying of the 1.5% charge is not what prevents termination of services. The customer can avoid termination of service only by paying the charge for

the telecommunications service. Merely paying the carrying charge will not prevent termination of service. Under the Commission's analysis, a customer could avoid termination of services by simply paying 1.5% of the monthly bill on a recurring basis. Such a result contradicts basic business principles and would result in the demise of BellSouth, as customers could avoid termination by paying only 1.5% of their bills. Furthermore, allowing customers to avoid termination by paying only the 1.5% carrying charge would effectively be giving certain customers free or reduced service, which is prohibited by Section 364.08, Florida Statutes (1999), and would give certain customers an undue advantage or unreasonable preference over other customers, which is prohibited by Section 364.10, Florida Statutes (1999).

Moreover, the Commission's statement that BellSouth's alternative to providing "service" through the interest carrying charge is to terminate the customer is not correct. In order to terminate a customer's account for non-payment, BellSouth must give the customer at least five days written notice, and, of course, continue to provide service in the meantime. Fla. Admin. Code R. 25-4.113(1)(f). Furthermore, BellSouth cannot terminate service in certain circumstances. For instance, BellSouth cannot disconnect for nonpayment of a dishonored check service charge. Id. In addition, BellSouth cannot discontinue service for a customer's Lifeline local service if the charges, taxes, and fees applicable to "dial tone, local usage, dual tone multifrequency dialing, emergency services such as '911,' and relay services are paid." Id.

Simply put, BellSouth is not offering customers a "service" through its 1.5% carrying charge. BellSouth is not in the business of providing credit. Instead, that charge is a penalty for a customer's failure to pay a bill on time, which allows BellSouth to recover the loss of the use of money that results from delinquent payments. To find otherwise results in absurd and unreasonable results.

b. The 1.5% Carrying Charge Does not Constitute "Telecommunications" or "Telecommunications Service."

As stated above, Section 364.02(5) defines nonbasic service as a telecommunications service. Although telecommunications is not defined in Chapter 364, [4] it does have a common, ordinary meaning, which is the meaning to be used under the law. Rollins, 761 So. 2d at 298. The leading telecommunications dictionary defines telecommunications as the "transmission, reception, and the switching of signals, such as electrical or optical, by wire, fiber, or electro/magnetic (i.e., through the air) means." Newton's Telecom Dictionary (16th Ed. 2000). Moreover, Webster's Dictionary defines telecommunications as "communication at a distance." New

[4] Telecommunications company is defined as: "[E]very corporation, partnership, and person and their lessees, trustees, or receivers appointed by any court whatsoever, and every political subdivision in the state, offering two-way telecommunications service to the public for hire within this state by the use of a telecommunications facility." §364.02(12), Fla. Stat. (2001). Telecommunications facility is defined to include "real estate, easements, apparatus, property, and routes used and operated to provide two-way telecommunications service to the public for hire within this state." §364.02(13), Fla. Stat. (2001).

Merriam-Webster Dictionary (1989). Webster's defines "communication" as, among other things, "exchange of information or opinions." Id.

Federal law similarly defines telecommunications as the "transmission, between or among points specified by the user of information of the user's choosing." 47 U.S.C. § 153 (43) (2001). Thus, based on the ordinary meaning of "telecommunications," BellSouth's carrying charge cannot be a telecommunications service because it does not involve the transmission of signals or information or otherwise involve communication.

Similarly, while Chapter 364, Florida Statutes, does not define telecommunications service as such, it does define types of telecommunication services. Basic local telecommunications service is defined as "voice-grade, flat-rate residential, and flat-rate single-line business local exchange services which provide dial tone, [and] local usage necessary to place unlimited calls within a local exchange area." § 364.02(2), Fla. Stat. (1999). In addition, Section 364.051(5)(a)(1) includes as a nonbasic service, among other things, "voice-grade, flat-rate multi-line business local exchange service[s]" such as "centrex lines, private branch exchange trunks, and any associated hunting services." Consistent with the fact that a nonbasic service must be a telecommunications service, these definitions describe services that all involve the transmission of signals or information.

When a statute provides specific examples of a general undefined term, the

related canons of statutory construction known as *ejusdem generis* and *noscitur a sociis* call for the general term to be limited "to include only things or persons of the same kind, class, or nature as those specifically enumerated." Smith v. State, 606 So. 2d 427, 428 n. 2 (Fla. 1st DCA 1992), rev. denied, 618 So. 2d 211 (Fla. 1993); Thomas v. City of Crescent City, 503 So. 2d 1299, 1300 (Fla. 5th DCA 1987). Interest carrying charges are qualitatively different from dial tone and Centrex lines; they are neither necessary to make a local exchange call nor are they features used during such a call. Thus, under the doctrines of *ejusdem generis* and *noscitur a sociis*, the interest carrying charge is not a telecommunications service contemplated by Section 364.051(5)(a), and the Commission was without authority to deny BellSouth's right to impose it.

Furthermore, statutes that relate to the same or closely related subjects should be read *in para materia*. State v. Fuchs, 769 So. 2d 1006 (Fla. 2000). Even though the term "telecommunications service" is not defined in Chapter 364, Florida Statutes, it is defined in Chapter 203, Florida Statutes (1999). Section 203.012(5), Florida Statutes (1999), defines "telecommunication service" to include, among other things, "[l]ocal telephone service, toll telephone service . . . [c]ellular mobile telephone . . . and pagers and paging, service."[5] An interest carrying charge does not bear any

[5] Section 203.012(5) was repealed by the enactment of the Communications Services Tax Simplification Law in 2000. However, the definition of "communication services" in Section 202.11(3), Florida Statutes (2000) includes only those services relating to

resemblance to these services, all of which involve the transmission of signals or information.

Finally, it is an established principle in interpreting statutes that "the same meaning should be given to the same term within subsections of the same statute." Rollins, 761 So. 2d at 298; see Allstate Ins. Co. v. Rudnick, 761 So. 2d 289, 292 (Fla. 2000). Section 364.051(5)(a), the statute being interpreted in this case, was enacted in 1995 as part of Chapter 95-403, Laws of Florida. The term "telecommunications service" appears in numerous places throughout that law in contexts in which it would be absurd to conclude that BellSouth's interest charge can be regulated as a telecommunications service. For example, the law requires an alternative local exchange telecommunications company to provide any other telecommunications company with "access to, and interconnection with, its telecommunications services." See Ch. 95-403, § 14, Laws of Fla. (codified at § 364.16(2), Fla. Stat.). Not only is it difficult to understand how a telecommunications company could give another telecommunications company access to an interest charge, there is no reason why the Florida Legislature would insist that they do so.

Similarly, the law codifies the Legislature's concern that "telecommunications services are being used or have been used by a customer . . . to violate state or federal

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the transmission of information and specifically excludes bad check charges, late payment charges and collection services.

law." Id. at §20 (codified at § 364.245, Fla. Stat.). Telecommunication services so used may be "discontinued

. . . [and] reinstated only by court order." Id. It makes no sense in the context of this section for "telecommunications service" to include an interest charge for the recovery of costs due to the loss of use of money while payment is delayed.

This conclusion is buttressed by the specific categories of nonbasic services adopted by the Commission. In 1996, the Commission adopted a stipulated agreement among a number of telephone companies setting out 10 categories of nonbasic services. In re: Investigation to determine categories of nonbasic services provided by local exchange telephone companies pursuant to Chapter 364.051(6), Florida Statutes, 96 F.P.S.C. 1:94 (1996). (R-137). These categories include business nonbasic exchange access, residence nonbasic exchange access, business operational services, residential operational services, local directory assistance and directory services, toll services, operator services, transport services, public and semi-public telephone, and miscellaneous services. Id. at 101. (R-147-149).

The only category arguably relevant to this case is miscellaneous services, which is described as "company-provided ancillary services other than those indicated in the preceding categories." See Id. at 107. (R-149). The examples given of such ancillary services are provision of 911 and E911 equipment, equipment for the hearing impaired, special number assignment, apartment door answering, high voltage protection, and

trouble location charge. Id. (R-154). While the list of examples does not purport to be exclusive, none of the examples is remotely comparable to an interest carrying charge on delinquent accounts. Along with the services described in the other nine categories, these examples share the quality of being used during a telephone call or involving the use of a telecommunications facility. Again, the canons of *ejusdem generis* and *noscitur a sociis* call for the general term "ancillary services" to be limited to those services that are qualitatively similar to the specified examples of such services.

Significantly, the Commission has rendered at least two decisions standing for the proposition that the determination of whether a service is a "telecommunications service" turns on a functional analysis of the service. In Order No. PSC-96-1545-FOF-TP, the Commission held that software enabling users to make free long distance calls over the Internet was not a telecommunications service because no transmission services were provided. In re: Petition for Declaratory Ruling, Institution of Rulemaking Proceedings, and Injunctive Relief, Regarding Intrastate Telecommunications services using the Internet by America's Carriers Telecommunications Association, 96 F.P.S.C. 12:385, 391 (1996). (R-250). The Commission explained that the software simply converted a void signal into data packets and that the "software manufacturer provide[d] no transmission services." (R-252-254).

The Commission has also held that advertising, billing, and collection services, which GTE offered to third-party publishers of yellow pages, are not telecommunications services, notwithstanding the fact that GTE is a telecommunications company. In re: Complaint of AGI Publishing, Inc. d/b/a Valley Yellow Pages Against GTE Florida Incorporated for violation of Sections 364.08 and 364.10, Florida Statutes, and request for relief, 99 F.P.S.C. 4:572, 576 (1999). (R-260). The Commission reasoned that because the questioned services rendered by GTE were not telecommunications services, the Commission had no authority to regulate them. Id. at 575. (R-263).

The same rationale applies to the Commission's effort to regulate BellSouth's interest carrying charge. Like Internet telephone software and yellow page advertising, billing and collection services, interest charges have no features in common with "telecommunications service," which involve the transmission of signals or information. Accordingly, the Commission contradicted its own precedent in holding that the interest carrying charge was a nonbasic service.

Finally, even if it were a close question as to whether BellSouth's interest carrying charge is a telecommunications service, which it is not, the Commission has recognized that when "there is reasonable doubt as to the scope of [an agency's] power, it should be resolved against the exercise of that power." Id. at 576. (R-265).

2. The Fact that the Interest Carrying Charge Is Assessed on a Customer's Use of Telecommunications Service Does Not Make the Charge a Telecommunications Service.

The Commission's premise that "absent BellSouth's core telecommunications operation, BellSouth would not have the ability to assess this interest charge on its customers," may be so, but this attenuated "but for" reasoning does not make the interest charge a telecommunications service. As stated above, under the Commission's precedent and the ordinary understanding of the term "telecommunications," the functional inquiry is whether the service in question involves the transmission of signals or information–not whether the service is offered by a telecommunications company.

Further, the mere fact that the interest charge is "assessed on a customer's use of telecommunications services" does not make it a derivative telecommunications service–a term that, in any event, does not appear in the definition of "nonbasic service." If this were correct, then inside wire maintenance charges and voice mail charges, both of which are "assessed on a customer's use of telecommunications service," would be considered nonbasic service subject to the price regulation statute, which is clearly not the case as neither charge is tariffed or subject to the price

regulation statute. To further illustrate this point, assume that a customer paid the telephone bill with a credit card, but then failed to pay the credit card bill on time. The credit card company would charge interest on the unpaid bill, and the balance due would be based on that "customer's use of telecommunications service." The credit card company, however, is not thereby providing a derivative telecommunications service, nor should its interest charge "be construed as a part of BellSouth's telecommunications operations." The same should hold true for BellSouth. The customer is the one who decides how the bill should be paid and when it should be paid, not BellSouth.

C. BellSouth's Tariff Filing Does Not Support a Finding that BellSouth Considered the Interest Carrying Charge to Be a Nonbasic Service.

In its Final Order in this case, the Commission appeared to be influenced by the fact that BellSouth represented that its 1986 late payment charge, which is distinct from the interest carrying charge, belonged in the miscellaneous basket of nonbasic services. However, the reason for this was that before price regulation, all revenue-producing items were subject to review by the Commission because BellSouth was regulated on the basis of its rate of return. When price regulation was instituted in 1996, the existing 1986 late payment charge was simply designated as being in the miscellaneous basket of nonbasic services because there was no place else to put it. BellSouth did not intend such designation to be a determination that the late payment charge was a

telecommunications service.

In any event, the dispute in this case is not over the status of the late payment charge which has now been restructured to a flat fee and which was approved by the Commission. The 1.5% interest carrying charge is an entirely different and new charge. It does not seek to recover the expenses incurred by BellSouth in the collection of overdue accounts. The cost at issue here is the cost of the use of money, not the cost associated with the collection of late payments, which was the sole basis of BellSouth's existing 1986 late payment charge. BellSouth has never characterized the interest carrying charge as a nonbasic service. Further, the mere reference to the interest carrying charge in the body of the tariff does not, per se, make it a nonbasic service. Not all charges included in a tariff are necessarily subject to Commission regulation. BellSouth included the interest carrying charge in its tariff because the tariff is the contract with its customers, and at the time of the tariff filing, BellSouth included all charges of any kind in the tariff.[6]

In sum, the Commission erred and exceeded its authority by finding that BellSouth's 1.5% interest carrying charge was subject to the price regulation statute

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[6] As a result of the Commission's Final Order in this case, BellSouth no longer includes all applicable charges in tariff filings. Instead, to avoid a similar misinterpretation of BellSouth's actions in the future, BellSouth only includes in tariff filings those charges that are subject to Commission regulation. BellSouth, however, informs the Commission of all charges it is imposing on customers, thereby allowing the Commission to take action if it believes a particular charge is subject to its regulation.

as a nonbasic service because such a charge does not constitute a "telecommunications service." The Commission's conclusion impermissibly expands the scope of the price regulation statute. Additionally, the Commission's analysis and reasoning violate fundamental statutory interpretation principles as well as its own precedent and leads to absurd and unreasonable results.

II. EVEN IF THE 1.5% INTEREST CARRYING CHARGE FOR LOSS OF USE OF MONEY IS A NONBASIC SERVICE, IT IS A NEW NONBASIC SERVICE AND THEREBY NOT SUBJECT TO SECTION 364.051(5)(a), FLORIDA STATUTES.

As argued in point I, BellSouth's interest carrying charge for the loss of the use of money is not a nonbasic service because it is not a telecommunications service. However, if this Court should conclude that the carrying charge is a nonbasic service, it is a new nonbasic service and not subject to the Commission's regulation. In its Final Order, the Commission conceded that new nonbasic services are not subject to the 6% rate increase limitation of Section 364.051(5)(a). (R-449: "We agree with BellSouth that revenues from new services are not initially included for purposes of nonbasic service category basket monitoring.").

The Commission concluded that the carrying charge was not a new nonbasic service because it found that the carrying charge was an expansion of BellSouth's 1986 late payment charge. The Commission based this finding on the belief that both the carrying charge and the late payment charge were associated with delinquent

customers' accounts. (R-447). Essential to this decision was the Commission's finding that the charges 'in both filings [were] triggered by a customer's non-payment of telecommunications services." (R-448). The Commission's decision on this issue should be reversed for the following reasons.

First, as stated by the Commission on page 10 of its order, a service is a "new" service when it addresses a "concern" or "issue" not previously addressed. (R-447). As previously stated, the late payment charge is entirely different from the carrying charge at issue on appeal. The Commission recognized that the late payment charge BellSouth instituted in 1986 was designed to recoup the "costs of collection" on delinquent accounts. In re: Review of Southern Bell Telephone and Telegraph Company's Late Payment Charge, 87 F.P.S.C. 7:300 (1987). (R-271). By contrast, the interest charge, which was implemented in 1999, allows BellSouth to recover losses incurred because of untimely payments alone, such as the cost of borrowing money to meet cash flow needs or loss of interest that BellSouth could have earned on the money if paid on time. Thus, there is no question that the interest carrying charge and the recovery of the loss of the use of money were not previously recovered prior to 1999. For this reason alone, the 1.5% interest carrying charge is a new nonbasic service that addresses a "concern or issue" that BellSouth never previously addressed.

Second, contrary to the Commission's analysis, although the two charges share

a similar trigger—a customer's failure to pay the bill on time—the fact that a single action by a customer triggers two charges is not sufficient to make those charges elements of a single telecommunications service. For example, caller ID identifies the originator of incoming calls, while privacy director blocks calls that are not identifiable. Despite their relationship, caller ID and privacy director are not rate elements of a single service. Rather, they are two different charges that fall within different nonbasic service categories. To further illustrate this point, assume that a cellular customer in Miami, pursuant to the terms of his or her cellular plan, pays roaming charges for calls made outside of Florida and $.69 per minute of use beyond 250 minutes per month. Further, assume that this customer has exceeded the threshold number of minutes and makes a 5 minute cellular call from Miami to Atlanta. As a result of this single act—calling a person in Atlanta—the customer incurs two separate charges: (1) roaming charges for the call; and (2) $.69 per minute because of exceeding 250 minutes of use. The fact that this single action caused two charges to be incurred does not mean that the two charges are the same or that they result from the same service. The roaming charge is a charge associated with making a call outside of Florida. The per- minute-of-use charge is a charge associated with the customer's exceeding the minutes allowed in his or her plan and would have been incurred regardless of the termination point of the call. Clearly, these two charges, although derived from the same act, are not the same. Likewise, BellSouth's late payment

charge and its interest carrying charge are distinct.

Third, contrary to the Commission's rationale, BellSouth's use of the words "plus" or "will add on" when referring to the restructured late payment charge and the new interest carrying charge, did not constitute a representation that they were one and the same. BellSouth obviously knew that if both charges were considered as one, they would exceed the 6% restriction on price increases for existing nonbasic services. Therefore, it is unreasonable to suggest that BellSouth did not intend for the interest carrying charge to be a new charge. Significantly, in the executive summary of the tariff filed in the case, BellSouth stated that the estimated revenue for the late payment charge was within the 6% interest allowed for the miscellaneous service basket, but explicitly referred to the 1.5% interest charge as a new charge. (R-455). In any event, the interest carrying charge is either a new charge or not a new charge and this Court's resolution of the issue cannot turn upon a disputed interpretation of the language used in earlier characterizations.

Fourth, the Commission's conclusion that the carrying charge is not a new charge that is separate from the late payment charge unfairly penalizes BellSouth. BellSouth's 1986 decision to institute a late payment charge was an innovation in Florida because no other investor-owned utility under the Commission's jurisdiction placed the costs of collecting late payment on those who caused the costs, rather than on the general body of taxpayers. Order Temporarily Approving Late Payment

Charge at page 1. (R-154). The Commission praised BellSouth's action to force delinquent customers to bear these costs. Id. If BellSouth had not instituted a late payment charge in 1986, the restructured late payment charge and the interest carrying charge that are at issue in this proceeding would both be new services for purposes of Section 364.051(5)(a), Florida Statutes, regardless of whether they are separate services or two elements of a single service. Under these circumstances, BellSouth's July 19, 1999, tariff would not have been subject to attack. Yet, in view of the Commission's Order, other telecommunication companies can now institute these charges for the first time at a higher rate than BellSouth will be permitted to do. Thus, the Commission has discriminated against BellSouth contrary to the legislative intent reflected by Section 364.051(5)(b), Florida Statutes (2000), which gives the Commission "continuing regulatory oversight of nonbasic services for purposes of . . . ensuring that all providers are treated fairly in the telecommunications market." § 364.051(5)(b), Fla. Stat. (1999).

It is undisputed that, prior to the implementation of the interest carrying charge, BellSouth had no mechanism by which to recover the cost of the loss of use of money. Thus, assuming arguendo that the 1.5% interest carrying charge is a nonbasic service, it is a new service, and the Commission is without authority to block its imposition.

CONCLUSION

The Final Order may only be sustained if the Commission is correct on all of several independent points: (1) that the carrying charge is a "service," (2) that it is a "telecommunications service," and (3) that it is not a new service. Because the Final Order fails to meet at least one, if not all of the foregoing criteria, it must be reversed.

Respectfully submitted this 3rd day of January, 2002.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was furnished by United States mail to Counsel for Appellees, Richard Bellack, Assistant General Counsel, Florida Public Service Commission, Division of Legal Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399; and Charles J. Beck, Deputy Public Counsel, Office of Public Counsel, c/o The Florida Legislature, 111 West Madison Street, Room 810, Tallahassee, Florida 32399-1400; this 3rd day of January, 2002.

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Attorney

CERTIFICATE OF FONT

I HEREBY CERTIFY that this brief was prepared using the Times New Roman 14-point font, which is proportionately spaced.

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Attorney

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